Filed 11/17/03 P. v. Maiden CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALVIN MAIDEN, Defendant and Appellant.	B161814 (Los Angeles County Super. Ct. No. KA054630)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip S. Gutierrez, Judge. Affirmed with modification.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

Defendant, Alvin Maiden, appeals from his convictions after a retrial for corporal injury to a cohabitant (Pen. Code,[1] § 273.5, subd. (a)) and assault by means of force likely to produce great bodily injury. (§ 245, subd. (a)(1).) The trial court found that defendant was previously convicted of three prior serious felonies and served five prior prison terms. (§§ 667, subds. (a)(1), (b)–(i), 667.5, subd. (b), 1170.12.) Defendant argues the trial court improperly: denied his mistrial motion made during the retrial; allowed the prosecution to reopen its case; and admitted evidence of prior assaults. Defendant also argues, and the Attorney General concedes, that the abstract of judgment must be corrected to more accurately reflect the trial court's restitution order.

We view the evidence produced during the retrial in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-320; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Defendant and Cynthia McClain began dating in December 1999 and later moved in together. On October 7, 2001, Ms. McClain and defendant had a disagreement. She wanted him to leave. Ms. McClain believed that defendant was under the influence of cocaine. Ms. McClain found defendant smoking a glass pipe the previous night. Ms. McClain had been a police officer in the military and with the San Bernardino Police Department. In that capacity, she was trained to recognize the effects of alcohol and drugs. Ms. McClain also was trained to apprehend and control "suspects." Defendant denied using drugs and refused to leave. Ms. McClain insisted that he leave and they began to argue. Both defendant and Ms. McClain had been drinking. Ms. McClain testified that she lunged at defendant as though to hit him. Defendant blocked her arm. Despite her prior contrary testimony, Ms. McClain denied that defendant hit her face or nose. Ms. McClain testified that she was a "little light headed" after defendant deflected her blow. She went into the bathroom. Ms. McClain had a vague recollection of hitting the wall. The next thing she knew, defendant was standing over her asking her if she was okay. The metal towel rack had bent into two pieces. Defendant told Ms. McClain that she had fallen and hit the

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

towel rack. On a previous occasion, Ms. McClain struck defendant in the face because he failed to pick her up from her job.

Azusa Police Officer Brandon Bailey responded to a report of a stolen automobile at Ms. McClain's home on October 19, 2001. While at Ms. McClain's home, Officer Bailey spoke by telephone with Officer Victor Hernandez. Officer Hernandez had spoken to Ms. McClain's mother and daughter regarding the October 7, 2001, incident. Officer Hernandez explained that defendant was Ms. McClain's boyfriend. Based on a conversation with Ms. McClain, Officer Hernandez believed that defendant had struck her during an argument. Officer Bailey noticed that Ms. McClain had a bandage across the bridge of her nose and her eye sockets were discolored and swollen. Officer Bailey asked Ms. McClain what happened to her face. Ms. McClain said defendant struck her in the face twice with a closed right fist during an argument. Ms. McClain told Officer Bailey that the argument was related to her request that defendant leave. Ms. McClain told Officer Bailey that she had gone to the hospital for treatment. Ms. McClain gave Officer Bailey a copy of the hospital form. Based on Ms. McClain's actions and demeanor, Officer Bailey believed that she feared defendant. Officer Bailey described Ms. McClain's statement to him as follows: "'If he finds anything with the word police on it in this house, he's going to get me while' – I believe she said while she was sleeping. She feared that." Ms. McClain appeared to be "paranoid" that defendant would return while the police were still present. Ms. McClain also said that defendant had struck her on a previous occasion. Ms. McClain believed that defendant had her car and she wanted to report it stolen. Ms. McClain indicated that she would not testify against defendant. She told Officer Bailey, "'I'm not going to tell you I fear him[.]'" Officer Bailey believed Ms. McClain felt she would be forced to testify if she said she feared defendant. Officer Bailey asked Ms. McClain if she had pushed or struck defendant. Ms. McClain said there was no physical contact on her part.

Officer Hernandez interviewed Ms. McClain at her residence on October 20, 2001. Ms. McClain appeared hesitant to discuss what had occurred because defendant had a key to the apartment and she feared he would return any moment. Although initially hesitant,

Ms. McClain indicated she wanted defendant prosecuted. Ms. McClain had a large bandage across her nose. Ms. McClain told Officer Hernandez that defendant hit her twice in the face and nose and once in the rib area. Officer Hernandez prepared a written statement regarding what Ms. McClain said had occurred. After reviewing the contents of the written statement, Ms. McClain signed it. A photocopy of the original statement written by Officer Hernandez and signed by Ms. McClain was marked as exhibit No. 4. When Ms. McClain testified for the defense, she denied the document produced at trial was the one she had signed. Ms. McClain believed Officer Hernandez placed her signature on a document she had never seen. On rebuttal, an exact photocopy of the document was authenticated by Officer Hernandez and marked as exhibit No. 6.

Charles Reyes worked with Ms. McClain at a Home Town Buffet restaurant. Mr. Reyes noticed that Ms. McClain had a black eye and her nose was "kind of busted up." Ms. McClain told Mr. Reyes that she had run into a door. However, the following day, Ms. McClain said her fiancé had caused the injuries when he "socked her." On October 28, 2001, defendant came to the restaurant and waited in her truck in the parking lot. Ms. McClain became frightened. Ms. McClain called the police to have defendant arrested on their way home. Azusa Police Officer Jerry Willison stopped the truck and arrested defendant. Ms. McClain was a passenger in the truck. Ms. McClain was crying and very distraught. Ms. McClain was trembling and almost collapsed. Ms. McClain told Officer Willison that she was relieved that "this ordeal was finally over." Ms. McClain said she had been trying to get defendant to turn himself in for several days. Ms. McClain had stayed at a motel the previous night because she feared defendant. However, defendant went to the motel and spent the night with her. On the morning of October 28, 2001, defendant refused to drive Ms. McClain to work. Ms. McClain walked to work that morning. Ms. McClain added that she feared that defendant would retaliate if he knew she had reported him prior to his arrest.

Gail Pincus, Executive Director of the Domestic Abuse Center, testified regarding common misconceptions about domestic violence. Ms. Pincus testified: women often do not leave a situation where domestic violence has occurred because of shame, self-blame,

and the stigma; the longer a woman has been in the relationship, the more responsible she feels for the violence; and the power and control used in a violent relationship makes the victim feel the violence was not that bad and it is her fault. Ms. Pincus stated that she would not be surprised to learn that a victim of domestic violence might also be employed in law enforcement at the same time. In her experience, Ms. Pincus found police officers who have been battered feel that it should have never happened to them. Ms. Pincus indicated: it was not uncommon for domestic violence victims to make a report to the police and later claim they were the initial aggressors in the abuse; threats and intimidation may cause the victim to change her story; this is because an individual can love and fear someone at the same time; the assailants also often take their victims to the hospital for treatment; and this allows the abuser to control to whom the victim speaks. Ms. Pincus indicated approximately 80 percent of domestic violence victims blame themselves, recant their prior testimony, change their stories, and do not appear to testify at the trial.

First, defendant argues the trial court improperly denied his mistrial motion during the retrial. In the first trial in this case, Officer Hernandez testified that he had a "face-to-face" with Ms. McClain following their telephone conversation. Officer Hernandez was defendant's parole officer. Thereafter, Officer Hernandez stated, "She told me that on October 7th that her and parolee Maiden had been there at their residence." The trial court dismissed the jurors. Defendant made a mistrial motion. Following a hearing, the trial court granted the mistrial motion based on the reference to defendant as a "parolee." Prior to the retrial, the trial court ordered that all witnesses be instructed they should make no reference to defendant's parole status.

At the retrial, Officer Hernandez testified that he had spoken to Ms. McClain by telephone on October 19, 2001. After indicating he met with Ms. McClain at her residence on October 20, 2001, Officer Hernandez stated, "When I met with her face-to-face . . . ." Officer Hernandez also went to defendant's residence. When asked what date that occurred, Officer Hernandez testified: "I believe that was also on the 19th. We were due to have a face-to-face . . . ." Officer Hernandez stopped speaking mid-sentence. The

jury was excused. Thereafter, a discussion between the court and counsel concerning whether Officer Hernandez was confused regarding the date in question or was deliberately lying to again expose defendant's parole status "inadvertently." Defendant made a mistrial motion. In denying the mistrial motion, the trial court noted: "I took it as he was going in that direction, and he realized face-to-face. And he's thinking, 'Oh, my God, how am I going to explain these activities,' and he stopped himself." Thereafter, defense counsel indicated he planned to "adopt" the term face-to-face to mean "meeting literally face-to-face." Defense counsel resumed cross-examination of Officer Hernandez. Defense counsel asked, "[W]e had been talking about a face-to-face that you had with a Gail McClain and Gigi McClain; is that correct?" Defense counsel then clarified that Officer Hernandez had received a telephone call regarding an incident between defendant and Ms. McClain. Officer Hernandez then "arranged for a face-to-face" with them later that day.

We review the trial court's denial of defendant's mistrial motion made during the retrial for an abuse of discretion. (*People v. Ayala* (2000) 24 Cal.4th 243, 283-284; *People v. Lucero* (2000) 23 Cal.4th 692, 713-714; *People v. Williams* (1997) 16 Cal.4th 153, 251; *People v. Marshall* (1996) 13 Cal.4th 799, 839.) The Supreme Court has held: "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1038, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1060; *People v. Cooper* (1991) 53 Cal.3d 771, 838-839.)

Nothing was said during the retrial to suggest that the term "face-to-face" was a phrase used by parole agents to describe a meeting with a parolee. During the retrial, Officer Hernandez was never identified as defendant's parole officer. In fact, defense counsel "adopted" the term in subsequent cross-examination to emphasize the fact that it meant a meeting with the person in question. Moreover, Officer Hernandez's first

reference to a face-to-face related to Ms. McClain and two relatives. Officer Hernandez's brief reference, "We were due to have a face-to-face" was insignificant when viewed in context with his meetings with Ms. McClain. The trial court's denial of the mistrial motion was not an abuse of discretion.

Second, defendant argues the trial court improperly allowed the prosecution to reopen its case for the purpose of admitting Ms. McClain's written statement contained in Officer Hernandez's report. As noted previously, Officer Hernandez testified regarding a statement written by him based upon Ms. McClain's representations about the October 7, 2001, assault. Officer Hernandez stated Ms. McClain read the statement and signed it in his presence. That document was identified as exhibit No. 4. On rebuttal, Ms. McClain testified that she signed a document when she met with Officer Hernandez on October 20, 2001. However, she denied that she signed exhibit No. 4 despite the fact that she recognized her signature on it. Ms. McClain believed that her signature had been placed on another document.

At the time the court and the attorneys were considering the admission of the prosecution's exhibits, defense counsel objected to the admission of exhibit No. 4: "We believe it is not an authentic document. The People have not provided the original. They have provided photocopies which they have not been able to prove is an exact duplicate. We have already seen from the photocopy . . . that there has been a redaction. So I do not believe that it's an authentic document." Defense counsel also argued the statement amounted to hearsay and did not constitute an exception as a prior inconsistent statement to Ms. McClain's testimony. The trial court overruled defense counsel's hearsay objection. But the trial court sustained defense counsel's lack of authenticity objection. The trial court ruled that because Ms. McClain testified on rebuttal that her signature appeared on exhibit No. 4 but the content was not the same as what she signed: "I'll let [the prosecution] reopen on Monday. I mean, over defense objection. But you need the document." Thereafter, Officer Hernandez testified: the document, now identified as exhibit No. 6, was an exact copy of the statement signed by Ms. McClain that he testified to previously; he did not affix Ms. McClain's signature to anything he had not read or

discussed with her; and he did not forge the document in any way. Ms. McClain again testified that exhibit No. 6 was not the one shown to her on October 20, 2001, but it did bear her signature. Exhibit No. 6 was then admitted into evidence.

The California Supreme Court has held, "We review for abuse of discretion a trial court's ruling on a motion to reopen a criminal case to permit the introduction of additional evidence. [Citation.] . . ." (*People v. Marshall, supra,* 13 Cal.4th at p. 836; *People v. Ayala, supra,* 23 Cal.4th at p. 282; see also §§ 1093, subd. (d), 1094; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 792-793; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520; *People v. Goss* (1992) 7 Cal.App.4th 702, 706 ["It is well settled that the trial court has broad discretion to order a case reopened and allow the introduction of additional evidence. [Citations.]"]; *People v. Rodriguez* (1984) 152 Cal.App.3d 289, 294-295 [factors an appellate court will consider in reviewing the trial judge's ruling include the stage the proceedings had reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect the jury would accord it undue emphasis, and its significance].)

In this case, the evidence in question had, in fact, been presented during the prosecutor's case in chief. It was not until Ms. McClain disputed the authenticity of the written statement that the necessity to reopen the prosecution's case arose. Although both sides had rested, the jury had not yet been instructed and closing arguments had not been made. The jury had already heard the conflicting testimony regarding the document. The only issue was whether the document itself would be admitted. No abuse of discretion occurred.

Third, defendant argues the trial court improperly admitted evidence that he hit Ms. McClain on a previous occasion. Prior to retrial in this case, the prosecutor moved pursuant to Evidence Code section 1103[2] to admit testimony that defendant previously hit

---

[2] Evidence Code section 1103 provides in pertinent part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the

Ms. McClain. The prosecutor argued: "[D]efense is going to bring out that the victim was the one who was the aggressor. And the People feel that this evidence shows that, even if it was 10 years ago, if she's struck by a man, that she's not going to be likely to be the one that goes out and tries to strike again in the future at any time." Defense counsel, John Blanchard, confirmed that: the defense case premised that Ms. McClain was the aggressor; Ms. McClain had been a member of the military police and worked as a peace officer in San Bernardino County; she had a drinking problem; and the fact that she is trained to apprehend and control suspects suggested that she was not the type of woman who would be afraid. In ruling the evidence admissible pursuant to Evidence Code section 1103, subdivision (b), the trial court noted: "I spent a lot of time – I talked about [Evidence Code section] 352 yesterday and this morning. And I already told [the prosecutor] my concern about when [*sic*]. And I'm still troubled by that [Evidence Code section] 352 point, but it seems to me it does become a jury question once the issue of self-defense – and you're saying that this victim, with this training, skill, expertise, mixed with alcohol and a temper, that that – that's character evidence."

Defendant appears to concede that the testimony was admissible pursuant to the provisions of Evidence Code section 1103, subdivision (b), but argues that such evidence is still subject to the scrutiny of Evidence Code section 352.[3] Evidence of the fact that defendant hit Ms. McClain on a previous occasion could properly be admitted pursuant to Evidence Code sections 352 and 1103, subdivision (b). (*People v. Koontz* (2002) 27 Cal.4th 1041, 1083-1084 [testimony concerning the victim's character for violence justified prosecutional presentation on rebuttal of evidence of defendant's armed robbery

---

evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1)."

[3] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury."

conviction]; *People v. Walton* (1996) 42 Cal.App.4th 1004, 1013-1015, overruled on another point in *People v Cromer* (2001) 24 Cal.4th 889, 901 [because the defense raised the issue of self-defense in response to victim's violence, rebuttal evidence of defendant's character was properly admitted]; *People v. Clark* (1982) 130 Cal.App.3d 371, 383-384 [same]; see also Simons California Evid. Manual (2002-2003 ed.) Evidence Affected or Excluded by Extrinsic Policies, § 6.25.) The California Supreme Court has held that the trial judge's ruling on such issues and the question of undue prejudice is reviewed for an abuse of discretion. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 495-496; *People v. Lewis* (2001) 26 Cal.4th 334, 374-375; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In this case, as the trial court noted at the hearing, defendant's decision to rely on the defense of self-defense to Ms. McClain's aggression triggered the provisions of Evidence Code section 1103, subdivision (b), thereby allowing the prosecutor to rebut that evidence with evidence of the prior assault. Although such evidence was prejudicial, the trial court could properly reasonably find that it was highly probative given Ms. McClain's contradictory statements as well as her fear of defendant as expressed to Officers Bailey and Hernandez. There was no abuse of discretion.

Fourth, defendant argues and the Attorney General concedes that the abstract of judgment should be corrected to more accurately reflect the $200 fines actually imposed by the trial court pursuant to sections 1202.4, subdivision (b)(1), and 1202.45. We agree. California Rules of Court, rule 12(c) provides in pertinent part: "(1) On motion of a party, on stipulation, or on its own motion, the reviewing court may order correction . . . of any part of the record." As a general rule, the record will be harmonized when it is conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) The Court of Appeal has held, "'[A] discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error.'" (*People v. Williams* (1980) 103 Cal.App.3d 507, 517, quoting the Los Angeles Superior Court Criminal Trial Judge's Bench Book at p. 452; see also § 1207; *In re Daoud* (1976) 16 Cal.3d 879, 882 fn. 1 [trial court could properly correct a clerical error

in a minute order nunc pro tunc to conform to the oral order of that date if there was a discrepancy between the two].) The trial court orally imposed separate $200 fines each pursuant to sections 1202.4, subdivision (b)(1), and 1202.45. The abstract of judgment of judgment erroneously reflects fines in the sum of *$400* as to each section. The abstract of judgment must be corrected to reflect the actual fines imposed.

The clerk of the superior court shall prepare and deliver to the Department of Corrections an amended abstract of judgment which accurately reflects the imposition of $200 fines pursuant to sections 1202.4, subdivision (b)(1), and 1202.45. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.